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In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEAN SPRIETSMA, PETITIONER,

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION, RESPONDENT.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

The complaint alleges that the boating accident in this case occurred on a navigable interstate waterway. Accordingly, the case is governed by federal maritime law and not the common law of any state. The questions presented are:

1. Whether federal common law, applied by state and federal courts adjudicating maritime claims, should be expanded to impose a duty to install "propeller guards," where Congress has committed that issue to a federal administrative agency and the agency has refused to require installation of propeller guards.

2. Alternatively, if state common law is applicable, whether a state law propeller guard claim arising from an accident on navigable waters of the United States is preempted by the Federal Boat Safety Act.

RULES 29.6 AND 14.1 STATEMENT

Respondent is Mercury Marine, an unincorporated division of Brunswick Corporation. Brunswick Corporation has no parent company, and no publicly held company owns 10% or more of Brunswick's stock.

Petitioner is Rex R. Sprietsma, administrator of the estate of Jeanne Sprietsma.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULES 29.6 AND 14.1 STATEMENT ii

STATEMENT OF THE CASE 1

A. The Federal Boat Safety Act 1

B. Preemption Under The Federal Boat Safety Act 3

C. The Federal Boat Safety Act's Savings Provision 5

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required 6

1. The Coast Guard's call for fact finding 7

2. The Subcommittee's propeller guard study 8

3. The Subcommittee's conclusions 10

4. The Coast Guard's adoption of the Subcommittee's recommendations 12

E. The Proceedings Below 13

INTRODUCTION AND SUMMARY OF ARGUMENT .. 14

ARGUMENT 17

I. FEDERAL MARITIME LAW BARS PETITIONER'S PROPELLER GUARD CLAIM 17

TABLE OF CONTENTS-Continued

Page

A. Petitioner's Claim Arises Under Federal Maritime Law 17

B. The Standard Of Liability In Maritime Wrongful Death Cases Is A Question Of Federal Common Law 19

C. Where Congress Has Empowered An Expert Agency To Prescribe Uniform Standards For Equipment Design, It Would Be Inappropriate To Permit Juries To Create Inconsistent Duties 20

D. Propeller Guard Claims Are Not Cognizable Under The Majority Common-Law Rule, Which Federal Maritime Law Generally Follows 25

II. PETITIONER'S CLAIM IS ALSO PREEMPTED BY THE BOAT SAFETY ACT 28

A. The Express Terms Of The Boat Safety Act Manifest Congress's Intent To Preempt Common Law Design Requirements 29

1. The express preemption clause bars petitioner's claim 29

2. The legislative history of the BSA confirms that Congress preempted the design standards field 33

3. The Boat Safety Act's savings clause cannot be read to save petitioner's defective design claim 36

TABLE OF CONTENTS-Continued

Page

B. Petitioner's Claim Would Frustrate The Purposes Of The Boat Safety Act 42

1. Petitioner's claim conflicts with the core objectives of the Act 42

2. The Coast Guard's decision not to require propeller guards reinforces a finding of conflict preemption 47

CONCLUSION 50

TABLE OF AUTHORITIES

Cases: **Page**

Allen v. *Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) 26

American Dredging Co. v. *Miller*, 510 U.S. 443 (1994) 20, 21

Arkansas Elec. Coop. v. *Arkansas Serv. Comm'n*, 461 U.S. 375 (1983) 19

Asahi Metal Indus. Co. v. *Superior Ct.*, 480 U.S. 102 (1987) 31

Beech v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991) 26

Bibb v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) 43

Blum v. *Bacon*, 457 U.S. 132 (1982) 19

BMW, Inc. v. *Gore*, 517 U.S. 559 (1996) 43

Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) .. 29, 43

Buckman Co. v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) 42

Calhoun v. *Yamaha Motor Corp., U.S.A.*, 216 F.3d 338 (3d Cir. 2000) 20

Carstensen v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995) 29

Caterpillar v. *Lewis*, 519 U.S. 61 (1996) 19

Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 31, 40, 41

TABLE OF AUTHORITIES-Continued

Page

City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) 28

Cooley v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1852) 34

Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 28, 45

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 31, 36, 49

Davis v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) 29

Dooley v. *Korean Air Lines Co.*, 524 U.S. 116 (1998) ... 22

East River S.S. Corp. v. *TransAmerica Delaval, Inc.*, 476 U.S. 858 (1986) 15, 19, 22, 25, 26, 28

Elliott v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990) 26, 43

English v. *General Elec. Co.*, 496 U.S. 72 (1990) 28

Erie R.R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 32

Farner v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992) 29

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 24

Finneseth v. *Carter*, 712 F.2d 1041 (6th Cir. 1983) 18

Fitzpatrick v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993) 26

TABLE OF AUTHORITIES-Continued

Page

Foremost Ins. Co. v. *Richardson*, 457 U.S. 668 (1982) 15, 18, 23, 34

Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) 19

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) ..... *passim*

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 34

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 28, 42

Illinois v. *Milwaukee*, 406 U.S. 91 (1972) 31

Jackson v. *OMI Corp.*, 245 F.3d 525 (5th Cir. 2001) 27

Jerome B. Grubart, Inc. v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) 18

Kassel v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) 44

Kolstad v. *ADA*, 527 U.S. 526 (1999) 19

Lady v. *Neal Glaser Marine*, 228 F.3d 598 (5th Cir. 2000), cert. denied, 121 S. Ct. 1402 (2001) 29

LeBron v. *NRPC*, 513 U.S. 374 (1995) 19

Lewis v. *Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), cert. dismissed, 523 U.S. 1113 (1998) 29

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The Lottawanna, 88 U.S. (21 Wall.) 558 (1874) 23

TABLE OF AUTHORITIES-Continued

Page

Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) .. 28, 31, 32, 33

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 26, 28

Milwaukee v. *Illinois*, 451 U.S. 304 (1981) ... 16, 18, 21, 22

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 22

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 20, 23

Moss v. *OMC*, 915 F. Supp. 183 (E.D. Cal. 1996) 29

Mowery v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991) 29

Mulhern v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. App. 1988) 39

Norfolk & W.R. Co. v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991) 32

Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 20, 39, 44

Parker v. *OMC*, No. J90-0011(L) (S.D. Miss. Feb. 28, 1991) 29

Pennsylvania R.R. v. *Public Serv. Comm'n*, 250 U.S. 566 (1919) 36

Pree v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993) ... 26

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 14, 35, 36, 47, 48, 50

TABLE OF AUTHORITIES-Continued

Page

Ryan v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997) 29

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 32

Saratoga Fishing Co. v. *J.M. Martinac & Co.*, 520 U.S. 875 (1997) 19

Sea-Land Servs., Inc. v. *Gaudet*, 414 U.S. 573 (1974) 25

Seymour v. *Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995) 26

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 33

Shield v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993) 29

Shields v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991) 26, 29

Southern Pac. Co. v. *Arizona*, 325 U.S. 761 (1945) 44

Southern Pac. Co. v. *Jensen*, 244 U.S. 205 (1917) ... 23, 28

Texas Indus. v. *Radcliff Materials*, 451 U.S. 630 (1981) 20, 24

United States v. *Locke*, 529 U.S. 89 (2000) 14, 24, 34, 36, 37, 43

United States v. *NASD, Inc.*, 422 U.S. 694 (1975) 24

Veal v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991) 26

TABLE OF AUTHORITIES-Continued

Page

Yamaha Motor Corp., U.S.A. v. *Calhoun*, 516 U.S. 199 (1996) 20

Statutes:

15 U.S.C. § 1397 (1988) 37

15 U.S.C. § 4406(c) 40

28 U.S.C. § 1331 32

28 U.S.C. § 1333(1) 18, 19

46 U.S.C. §§ 4301-4311 1

46 U.S.C. § 4301(a) 14

46 U.S.C. § 4302(a) 1

46 U.S.C. § 4302(c)(1) 2

46 U.S.C. § 4302(c)(2) 2

46 U.S.C. § 4302(c)(3) 1, 46

46 U.S.C. § 4302(c)(4) 2, 7

46 U.S.C. § 4306 ..... *passim*

46 U.S.C. § 4311(g) 5, 6, 36, 37, 39, 40, 41

46 U.S.C. § 13110 ..... 2, 22

46 U.S.C. § 13110(a) 2

46 U.S.C. § 13110(b)(1) 2

TABLE OF AUTHORITIES-Continued

Page

46 U.S.C. § 13110(b)(2) 2

46 U.S.C. § 13110(b)(3) 7

Pub. L. No. 92-75, 85 Stat. 213 (1971) 1, 2

Legislative History:

S. Rep. No. 92-248 (1971) ..... *passim*

H.R. Rep. No. 92-324 (1971) 1, 3, 5, 25, 33, 35

117 Cong. Rec. 28036 (1971) 6

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) 3, 5, 37, 39

Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) 3, 4

Regulatory Materials:

33 C.F.R. Chap. I, Subchap. S 6

33 C.F.R. Part 175 6

33 C.F.R. Part 183 6

33 C.F.R. § 183.53 ..... 7, 45, 47

TABLE OF AUTHORITIES-Continued

Page

33 C.F.R. § 183.710 ..... 6, 39

33 C.F.R. § 183.715 6

36 Fed. Reg. 15764 (Aug. 18, 1971) 13

38 Fed. Reg. 6914 (Mar. 14, 1973) 13

53 Fed. Reg. 33210 (Aug. 30, 1988) 8

53 Fed. Reg. 43069 (Oct. 25, 1988) 8

53 Fed. Reg. 43070 (Oct. 25, 1988) 8

54 Fed. Reg. 15066 (Apr. 14, 1989) 8

54 Fed. Reg. 15068 (Apr. 14, 1989) 8

54 Fed. Reg. 42138 (Oct. 13, 1989) 8

60 Fed. Reg. 25191 (May 11, 1995) 12

61 Fed. Reg. 13123 (Mar. 26, 1996) 13

62 Fed. Reg. 22991 (Apr. 28, 1997) 13

66 Fed. Reg. 63645 (Dec. 10, 2001) 13

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) .. *passim*

Miscellaneous:

Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210 (1996) 25

TABLE OF AUTHORITIES-Continued

Page

James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) 25, 38

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) 27

RESTATEMENT (SECOND) OF TORTS § 402A (1965) 25

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) 27

14A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3671 (1998) 19

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

A. The Federal Boat Safety Act

Congress enacted the Federal Boat Safety Act ("BSA"), 46 U.S.C. §§ 4301-4311, to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve these goals by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.* The BSA represents "a single comprehensive piece of legislation" that "preempts the field on boating standards or regulations." H.R. Rep. No. 92-324, at 9-11 (1971) ("H.R. Rep.").

The Act empowers the Coast Guard to prescribe comprehensive federal design standards for boats and associated equipment, including motors. It directs the Coast Guard to prescribe regulations:

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard—
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance * * * .

46 U.S.C. § 4302(a). The Act further provides that the Coast Guard may "not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence." Standards requiring even insubstantial alterations of boats must be necessary "to avoid a substantial risk of personal injury to the public" and "appropriate in relation to the degree of hazard that the compliance will correct." *Id.* § 4302(c)(3). "The term 'substantial alteration' is intended to encompass economic as well as physical considerations." Congress intended "that great caution be exercised in applying standards to existing boats because of the great burden this can create on both

manufacturers and the boating public." S. Rep. No. 92-248, at 18-19 (1971) ("S. Rep."); see *id.* at 18 ("no standard may compel substantial alteration of an existing boat").

In considering whether to adopt manufacturing standards, the Coast Guard must consider "the need for and the extent to which the regulations will contribute to recreational vessel safety," "relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation," and "whether any proposed regulation or standard is reasonable and appropriate for the particular type of boat or associated equipment for which it is prescribed." 46 U.S.C. § 4302(c)(1)-(2); Pub. L. No. 92-75, § 6(3), 85 Stat. at 216. It must also "consult with" the National Boating Safety Advisory Council ("NBSAC" or "Council") in deciding whether to regulate. 46 U.S.C. §§ 4302(c)(4), 13110. The Council's 21 members, all appointed by the Secretary, must have expertise in recreational boating safety and represent three different constituencies: (a) seven officials responsible for state safety programs; (b) seven representatives of manufacturers; and (c) seven representatives of boating organizations and the general public. *Id.* § 13110(a), (b)(1). "Additional individuals" from these sources "may be appointed to panels of the Council to assist the Council in performing its duties." *Id.* § 13110(b)(2).

Although Congress was of the view that "[t]he overriding consideration in the issuance of standards [is] safety," it recognized that establishing reasonable standards "necessarily also involves a consideration of technical feasibility and cost." S. Rep. at 17. Congress expected the Coast Guard to conduct a cost-benefit analysis of all proposed standards, whereby it would "weigh the degree of a hazard which has been perceived" and "require compliance with a standard to obviate the hazard when compliance is economically and physically reasonable in relation to the hazard involved." *Id.* at 18. "It was precisely to take advantage of the expertise and flexibility

available in the administrative process in these regards, and the possibility for continuous review and updating of standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.* at 17.

B. Preemption Under The Federal Boat Safety Act

The BSA mandates "national construction and performance standards for boats and associated equipment." S. Rep. at 15. Congress was particularly concerned that such requirements be nationally uniform: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." *Id.* at 14; see H.R. Rep. at 29. Prior law did not preempt state design requirements, and Congress believed that "[i]t [was] time that recreational boats be built in accordance with standards prescribed by one Federal agency." H.R. Rep. at 2. As Representative Monagan stated: "A proliferation of dissimilar standards would give the manufacturer * * * an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now." *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 101 (1971) ("S. Hearing").[1]

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[1] Accord H.R. Rep. at 16 ("it is intended that the uniformity of standards expected under this Act shall not be upset by excessive special requirements by individual states"; states may regulate only if "required to meet uniquely hazardous conditions or circumstances within that state" and if regulation is approved by the Secretary); *id.* at 29; *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 37 (1970) ("H. Hearings") (the BSA "precludes the establishment or enforcement of state boat safety standards and equipment requirements which are not identical to Federal standards * * * . The reason for such a preemption is to insure that manufacturers building for the entire domestic trade will not find themselves in the unfortunate position of having to comply with varying boat safety standards in different places"); *id.* at 61 ("it is quite important both for the convenience

Congress also recognized that maritime safety traditionally has been an area where federal regulation predominates. As the Senate Report explains: "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20.

These considerations led Congress to draft the BSA's preemption clause in broad and inclusive terms:

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or

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of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country"); *id.* at 54 ("A single set of standards is * * * necessary"); *id.* at 59 (federal standards "should preempt State and local jurisdictions as their laws might affect the manufacturer"); *id.* at 66 ("The need for uniformity, particularly with respect to standards for boats and associated equipment, now requires preemption by the Federal Government"); *id.* at 66, 67 (the "lack of uniformity" is "both a real and potential problem" that is "costly to manufacturer and boatman alike" and "now requires preemption by the Federal Government"); *id.* at 84 ("the State must not be delegated any authority in carrying out any of those provisions applying to boat construction and design"); *id.* at 67, 86; S. Hearing at 45 ("Presently, the Federal Government cannot preempt the boating standards field. It is even possible for States independently to establish safety standards and equipment requirements so varied as to make it difficult for the manufacturer to comply with all of them, and, of course, for the boatman to comply with the law when he moves between jurisdictions. This legislation will provide a solution to this problem"); *id.* at 98 ("no State, without the consent of the Secretary of the Department of Transportation, may be more restrictive in equipment requirements, thereby assuring uniformity among the several Government jurisdictions"); *id.* at 54, 68, 70.

> circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. By mandating that any state design standard be "identical" to an on-point Coast Guard regulation, the preemption clause "preempts the field on boating standards or regulations" and "assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." H.R. Rep. at 11; S. Rep. at 20. However, § 4306 "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." *Ibid.*

C. The Federal Boat Safety Act's Savings Provision

Late in the course of Congress's consideration of the BSA, the Senate Commerce Committee added a "Savings Provision" to the bill (see S. Rep. at 31): "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Congress made no distinction between liability under "common law" and "State law."

Section 4311(g) was added "to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability *which otherwise could pertain*" —*i.e.*, "liability under the usual tort law concerning negligence or warranties." S. Hearing at 66 (statement of Coast Guard Commandant Admiral Bender) (emphasis added). In the same statement in which he remarked that the Coast Guard "would have no objection" to clarifying the Act in this regard, Admiral Bender explained that "[t]he Federal Government cannot now preempt the boating standards field" and that "it is possible for States independently to establish safety standards and equipment requirements so varied as to make it difficult for the manufacturer to comply with the law." "[T]his legislation will correct these problems." *Id.* at 50.

The savings clause did not preserve common law claims that impose *design* requirements on manufacturers, which are subject to preemption. Rather, as the Senate Report explains, the savings clause avoids an absolute defense in the "usual" tort case where state law still plays a role (S. Rep. at 32):

> The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.

The only recorded discussion of § 4311(g) in the House was a brief colloquy in which Representative Grover described it as a "technical amendmen[t] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. 28036 (1971).

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required

The Coast Guard has promulgated a host of federal boat and motor design standards. See 33 C.F.R. Chap. I, Subchap. S. In particular, it has adopted numerous "Equipment Requirements," including design standards for boat motors, electrical and fuel systems, distress signals, and ventilation systems. See *id.* Parts 175 (Subparts B-D), 183 (Subparts D-L). Several Coast Guard manufacturing standards are specifically designed to mitigate the risks of passengers falling out of boats or being struck by propellers, as happened here. For example, the Coast Guard requires that boats with outboard motors either be equipped with a device to prevent them from starting in gear or display a warning. 33 C.F.R. §§ 183.710, 183.715. Similarly, it has promulgated an extensive body of rules governing the "maximum weight" and "persons capacity" of boats, and another set of regulations requiring that all boats pass elaborate "stability tests." *Id.* Part 183, Subparts B-C, G-H.

The Coast Guard exhaustively regulates the "safe powering" and "maximum horsepower capacity" of boats, the "placement"

of outboard motors, and the "quick turn" capability of boats equipped with such motors as well. *Id.* § 183.53. These latter requirements—which mandate that boats must be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle" at "maximum throttle" (*ibid.*)—are particularly relevant here, because the NBSAC's Propeller Guard Subcommittee, discussed below, found that boats with propeller guards could not pass this test. J.A. 31-32.

1. The Coast Guard's call for fact finding

In 1988, the Coast Guard received rulemaking petitions requesting that it require manufacturers to install propeller guards on boat motors. As required by 46 U.S.C. § 4302(c)(4), the Coast Guard consulted with the NBSAC and directed it to:

- "Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water," and
- "Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public."

NBSAC, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) ("Report"), Appendix A (J.A. 43).

Pursuant to 46 U.S.C. § 13110(b)(3), the NBSAC in turn appointed a subcommittee to "assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and the "[f]easibility of some form of mechanical guard or other action to prevent such contact." J.A. 12. The NBSAC further charged the Subcommittee to consider "the incidence of [propeller-related] accidents," "the possible solutions and their advantages/disadvantages," "the direct costs and indirect costs (fuel economy, maintenance, etc.) of mechanical solutions," whether

"the risks [can] be addressed adequately by education," "the potential for propellers equipped with each of several propeller guard designs to cause injury," whether the Coast Guard should "move towards a federal requirement for some form of propeller guard" and, if so, whether the requirement should be imposed on "only new boats and motors" or "all boats." J.A. 43-44.

The Subcommittee comprised representatives of every interested constituency—state boat safety officials, industry representatives, members of recreational boating groups, and members of the general public. J.A. 71. Throughout its study, it invited oral and written participation from others by publishing notices of its proceedings in the Federal Register.[2]

Over an 18-month period, the Subcommittee heard from designers of propeller guards, accident victims, attorneys, engineers, naval architects, academics, industry representatives, and medical doctors. It conducted a "comprehensive" review of the "documentation, materials and information" about propeller-related injuries, including videos, articles, patents, test data, and statistics pertaining to the causes of boating accidents. It held public meetings across the country. And it conducted its own on-water tests of propeller guards. J.A. 12-17, 49-60.

2. The Subcommittee's propeller guard study

Initially, the Subcommittee reviewed the risk of fatality from power-boating compared to that of other activities, including other types of boating, and found the risk to be small. J.A. 24. It further found that, of the boating injuries caused by propeller strikes, many involve "[p]assengers moving about or improperly seated." J.A. 25. "Operator inexperience, incompetence, negligence, and alcoholic intake are significant contributing factors

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[2] See, *e.g.*, 53 Fed. Reg. 33210 (Aug. 30, 1988); *id.* at 43070 (Oct. 25, 1988); *id.* at 43069; 54 Fed. Reg. 15068 (Apr. 14, 1989); *id.* at 15066; *id.* at 42138 (Oct. 13, 1989).

in reported 'propeller strikes,'" the Subcommittee noted, and "approximately 80% of all accidents occur when a boat is operating at speeds in excess of 10 miles per hour, i.e. normal operating or planing speeds." *Ibid.* The latter finding was important because "a skull impact at 10 mph or more in the water would be generally fatal"—"[e]ven with an idealized cushioning material, not currently known to exist." J.A. 33.

The Subcommittee then proceeded to examine each of the "three basic configurations of 'propeller guards'": (1) ring-type guards, (2) screen- or cage-type guards, and (3) nozzle-type guards. J.A. 27-28. Observing that any propeller guard requirement "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them," it stated that "[f]easibility" was an "important questio[n] before the Subcommittee." J.A. 18.

Ring-type guards consist of a circular band surrounding the motor's propeller to prevent contact from the propeller's side. J.A. 27. However, the Subcommittee found that "the ring-type guard creates severe steering and trim effects which cause serious safety and control problems." J.A. 31. In on-water tests, for example, "the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result." *Ibid.* Moreover, ring-type guards create "a new hazard"—"an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller." J.A. 36.

Cage- or mask-type guards consist of "a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires." J.A. 28. The Subcommittee found, however, that such guards are only feasible for use on slow-moving "rescue boats" or "amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible," and where "a blow to a person in the water" has "minimal effects." "No

evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." J.A. 30.

Both ring- and mask-type guards "affect boat operation adversely," "result in drag increasing proportionally to the square of speed, resulting in substantial power and speed loss," and "substitute the potential of blunt trauma injury, which becomes increasingly significant at speeds over 10 mph, leading to an ascending serious risk of fatality." J.A. 36, 37.

Nozzle-type guards surround the propeller with "a tunnel or tube" and are designed "to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships." But "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." J.A. 28, 30.

3. The Subcommittee's conclusions

Based on the data it collected, the Subcommittee conducted a cost-benefit analysis of propeller guards, explaining that any "technologically feasible safety featur[e]" must "minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk." J.A. 35. The Subcommittee rejected "assert[ions] that propeller guard technology and/or availability meets the foregoing criteria and that guards should be mandated." J.A. 35-36. Rather, it found "that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades." Pet. App. 3. Propeller guards would also require manufacturers greatly to increase their engine horsepower and degrade fuel economy. J.A. 32, 37.

The Subcommittee's lengthy report thus concluded that "propeller guarding at best could have only a negligible impact on improving boating safety," and that "[o]perators of a 'guard-equipped' boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage." J.A. 36, 39. As stated in the Report's Conclusions:

> The development and use of devices such as "propeller guards" can * * * be counter-productive and can create new hazards of equal or greater consequence. * * * [T]here are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

J.A. 39-40. The Subcommittee added that any propeller guard must have "hydrodynamic compatibility with the hull on which the motor is used." Since there are hundreds of engines and "thousands of hull designs, the possible hull/propulsion unit combinations are extremely high"—combinations that are not under the control of manufacturers because motors are not built for specific boats but for *all* boats with appropriate horsepower ratings. J.A. 38. And even if propeller guards were feasible and safe, the Subcommittee concluded that "[t]o retrofit the some 10 to 15,000,000 existing boats would * * * require a vast number of guard models at prohibitive cost." *Ibid.*

The Subcommittee made several policy recommendations to the NBSAC. It first recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 40. Instead, the Coast Guard should (among other things) implement "educational and awareness campaigns" regarding "potential hazards associated with careless or negligent boat operation" and "review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore

and aft view of the boat operator." J.A. 40-41. There were no "dissenting statements." J.A. 13.

4. The Coast Guard's adoption of the Subcommittee's recommendations

The NBSAC and the Coast Guard *unanimously* adopted the Subcommittee's recommendations. J.A. 78; J.A. 80 ("All of the report's recommendations are accepted" and "will be implemented"). In keeping with the Council's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard expressly declared that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." J.A. 80 (emphasis added). In addition to the accident data set forth by the Subcommittee, the Coast Guard cited "the many questions about whether a universally acceptable propeller guard is available or technically feasible" and the fact that "retrofitting millions of boats would certainly be a major economic consideration" as grounds for rejecting a propeller guard requirement. *Ibid.* See also J.A. 83 (noting "the vast array of boat configurations").

The Coast Guard also announced that it would take the alternative steps recommended by the Subcommittee to prevent propeller accidents. J.A. 82. And it noted that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices." J.A. 81. However, despite several instances in which the Coast Guard has invited the public to submit information regarding the feasibility of fitting *other* types of boats with propeller guards (*e.g.*, houseboats), it has never altered its conclusions regarding *planing* boats.[3] And in one notice of proposed rulemaking, it

[3] In 1995, the Coast Guard issued a Notice and Request for Comments on "the public's present feelings about the use of propeller guards" on "houseboats." 60 Fed. Reg. 25191 (May 11, 1995). In 1996, it issued an Advance Notice of Proposed Rulemaking "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13123 (Mar. 26, 1996); see also 62 Fed. Reg. 22991 (Apr. 28, 1997) (soliciting comments on the effectiveness of specific devices that have been suggested for reducing the number of accidents involving propellers of rented boats). In 2001, the Coast Guard issued a Notice of Proposed Rulemaking (superseding its 1996 advance NPRM) that "proposes to require owners of *non-planing recreational houseboats* with propeller-driven propulsion located aft of the transom" to install either propeller guards or "swim ladder interlocks," "ignition cut-off switches," and "clear visibility aft devices" (such as mirrors). 66 Fed. Reg. 63645, 63649 (Dec. 10, 2001) (emphasis added). The Coast Guard has never proposed propeller guards for planing boats or questioned any finding in the Subcommittee Report.

reiterated that "[u]nder current Federal statutes (46 U.S.C. 4306), the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction," 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996), a point repeated in its amicus brief in this Court. U.S. Br. 11-12. The Coast Guard has held this view since the Act was adopted. See 36 Fed. Reg. 15764 (Aug. 18, 1971); 38 Fed. Reg. 6914 (Mar. 14, 1973).

E. The Proceedings Below

The complaint alleges that in July 1995, while boating in Tennessee, Jeanne Sprietsma "was caused to fall from the boat" in which she was riding as a passenger. J.A. 101. Ms. Sprietsma, an adult woman, allegedly was struck by the boat motor's propeller and sustained fatal injuries. The engine was a 115-horsepower outboard motor manufactured by Mercury Marine and was equipped with a traditional propeller. J.A. 131.

The accident occurred in the Mitchell Creek portion of Dale Hollow Lake, a major interstate body of water that spans the Kentucky-Tennessee border. J.A. 101. Dale Hollow Lake was created by a dam built by the U.S. Army Corps of Engineers pursuant to the Flood Control Act of 1938 and the Rivers and

Harbors Act of 1946. It covers 935 square miles and has more than 600 miles of shoreline, as well as 14 commercial marinas and dozens of lodges, motels, and campgrounds. See www.orn.usace.army.mil/op/DAL/rec/ (visited Apr. 11, 2002).

The complaint asserts tort claims against Mercury Marine, alleging that its outboard motor was defective for lack of a "propeller guard." J.A. 100-110. Mercury Marine moved to dismiss the complaint, contending that petitioner's claims were preempted. The Cook County Circuit Court agreed, and the Appeilate Court affirmed, observing that "every federal court to have considered the issue" has found preemption. Pet. App. 38, 39.

The Illinois Supreme Court affirmed. It first ruled that the BSA, which applies to boats operated "on waters subject to the jurisdiction of the United States" (46 U.S.C. § 4301(a)), is predicated on the "federal maritime jurisdiction." Pet. App. 5-6. Propeller guard claims therefore "bear upon an area historically regulated by the federal government" and are governed by "admiralty" principles. *Ibid.* (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)).

The court then held that petitioner's state-law claims were impliedly preempted under a long line of this Court's decisions, including *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), *United States* v. *Locke*, 529 U.S. 89 (2000), and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). The court observed that "the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." Pet. App. 18-19.

INTRODUCTION AND SUMMARY OF ARGUMENT

Virtually every court to consider the question presented—three federal courts of appeals, three state courts, and several federal district courts—has concluded that state common law "propeller guard" claims are preempted by the Boat Safety Act. We defend this substantial body of precedent below. Before

reaching the preemption question, however, it is necessary to resolve a predicate question that is ultimately easier and clearer: whether state law applies *at all* to a claim arising out of a boating accident on navigable waters.

This case arose on the waters of Dale Hollow Lake, a large navigable waterway crossing the Kentucky-Tennessee border. As the Illinois Supreme Court held, it is therefore "within the admiralty jurisdiction of the federal courts," "an area historically regulated by the federal government." Pet. App. 6. Thus, under this Court's precedents, this case is governed *exclusively* by federal maritime law, not by the common law of Illinois or any other state. *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674 (1982); *East River S.S. Corp.* v. *TransAmerica Delaval, Inc.*, 476 U.S. 858, 864-865 (1986). Since it is undisputed that propeller guards are not required by federal law, the decision below should be affirmed without regard to preemption. There can be only *one* federal answer to the propeller guard question, and Congress has given the Coast Guard responsibility for providing that answer.

At most, therefore, this case presents the question whether a federal maritime action survives in the face of Congress's enactment of a comprehensive regulatory scheme and an expert agency's considered decision not to mandate propeller guards under federal law. Federal maritime law does not countenance ad hoc adjudication of equipment design claims that Congress delegated to the Coast Guard under detailed criteria. Petitioner asks this Court to ignore the serious safety, efficiency, and feasibility problems that the NBSAC concluded propeller guards would inflict. It would undermine maritime uniformity interests and the BSA's command of centralized agency supervision to allow juries in fifty different States to reach their own conclusions about propeller guards—some demanding one propeller guard design, other juries requiring another, and still others penalizing their use in any form.

As the court below (and eleven others) have concluded, such a fragmentary regime would frustrate the intent of Congress, which is the ultimate touchstone in this case. The reasons that convinced these courts that the federal scheme preempts state law apply *a fortiori* when the case is viewed, correctly, as one of displacement of federal common law by statute. The preeminence of federal statutes over federal common law is well settled. See *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

Even if this case were viewed as a traditional preemption case, the decision below would plainly be correct. It is undisputed that if a state legislature or agency tried to mandate propeller guards, such a requirement would be preempted by the BSA. See U.S. Br. 11-12 ("the Coast Guard's failure to promulgate a propeller guard requirement categorically precludes the States from adopting such a requirement by statute or regulation"). Common law propeller guard claims are subject to the same analysis under the BSA's preemption provision.

The savings clause on which petitioner relies—unlike the savings clause in *Geier*, 529 U.S. at 868—makes no distinction between state common law and state prescriptive law. By its terms, it applies to "liability at common law or under State law." Thus, if the clause were read in the "all-inclusive" manner that petitioner advocates (Br. 29), it would completely repeal the preemption clause. That reading cannot be correct.

Rather than drawing a line between common law and prescriptive law, Congress drew a line between product design standards, which are exclusively federal, and ordinary negligence and warranty claims—such as defective manufacture or installation—which are not preempted. Since petitioner's claim is a product *design* claim, it is preempted by the BSA's preemption provision.

Petitioner's propeller guard claim also conflicts with the Act's goals. The NBSAC found—and the Coast Guard has never questioned this finding—that propeller guards are at best

infeasible and may cause more (and more serious) accidents. If petitioner convinced a jury to require installation of such guards under state tort law, manufacturers would face a Hobson's choice: they would be liable for failing to install propeller guards in some States, and liable for installing them in others.

Moreover, state legislatures and agencies would be unable to correct the problem, because statutes and regulations in this field are expressly preempted. If the legislature of Tennessee (where this accident occurred) or Illinois (where this suit was brought) agreed with the NBSAC that propeller guards are dangerous and counterproductive, it could do *nothing* to prevent juries from imposing them. There is no reason to think that Congress intended to create such a bizarre scheme —allowing state juries to second-guess federal regulators with regard to safety measures on federal waters, but expressly preempting state legislatures from correcting their mistakes.

ARGUMENT

I. FEDERAL MARITIME LAW BARS PETITIONER'S PROPELLER GUARD CLAIM.

A. Petitioner's Claim Arises Under Federal Maritime Law.

Because this case is governed by federal maritime law, this Court need not reach the question whether federal law preempts state law in this field. Although this litigation was primarily conducted on the assumption that state common law applied, the record fully supports—indeed compels—the conclusion that the case falls within federal maritime jurisdiction, and the parties briefed and argued all points necessary to that conclusion.[4] We argued below that petitioner's claim arises in "an area outside the traditional police powers of the States—the 'historic

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[4] See Pet. Br. 19-20 (disputing the Illinois Supreme Court's conclusion that this case falls within federal maritime jurisdiction).

federal maritime jurisdiction.'" Br. 29 & n.9 (quoting S. Rep. at 17); *id.* at 36 (same). Citing this Court's maritime decisions and noting that "[b]oat safety simply is not, and never has been, a subject of traditional state regulation," we showed that Congress "plainly intended that the federal government would occupy the field of marine design and equipment requirements." *Id.* at 29, 36, 48. We explained that the "federal cast of admiralty law" serves "overriding federal maritime principles and policies," including "uniform" regulation. *Id.* at 30 n.9. The court below agreed, concluding that the case arises "within the admiralty jurisdiction of the federal courts"—"an area historically regulated by the federal government." Pet. App. 6. Accord Amicus Br. of Association of Trial Lawyers of America 21-30.

That conclusion is undoubtedly correct. The complaint here alleges that the accident occurred on Dale Hollow Lake—a large, navigable waterway with hundreds of miles of coastline. The lake was created by the U.S. Army Corps of Engineers, is home to many marinas and other commercial enterprises, and traverses the Kentucky-Tennessee border. See www.orn.usace.army.mil/op/DAL/rec/ (visited Apr. 11, 2002). See *Finneseth* v. *Carter*, 712 F.2d 1041, 1047 (6th Cir. 1983) ("Dale Hollow Lake * * * meets the Supreme Court's requirements for navigability for admiralty jurisdiction").[5]

Because it arises under federal maritime law, it follows not only that this case is not governed by any presumption against preemption; it is not subject to preemption analysis *at all*. See *Milwaukee* v. *Illinois*, 451 U.S. 304, 316 (1981). As shown below, federal maritime law cannot possibly be read to impose

[5] Federal maritime jurisdiction applies where an alleged tort occurs on navigable waters and has both a "potentially disruptive impact on maritime commerce" and a "substantial relationship to traditional maritime activity." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); see 28 U.S.C. § 1333(1). It encompasses recreational boating accidents. *Foremost*, 457 U.S. at 674.

a federal duty to install propeller guards on boat motors, when the agency designated by Congress to make such judgments has concluded otherwise. This would defeat Congress's goal of uniformity in the BSA and substitute ad hoc jury verdicts for the expert determinations of a federal administrative agency. This constitutes an independent ground for affirmance that does not require resolution of any issue of preemption of state law.[6]

B. The Standard Of Liability In Maritime Wrongful Death Cases Is A Question Of Federal Common Law.

Federal maritime law as elaborated through the BSA—not state common law—governs whether boat engines operated on navigable waters must have propeller guards. Claims arising out of accidents on navigable waters may be brought in state court as federal maritime claims under the "saving to suitors" clause. *East River S.S. Corp.* v. *TransAmerica Delaval, Inc.*, 476 U.S. 858, 865 (1986); *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 520 U.S. 875 (1997); 28 U.S.C. § 1333(1). But even then, substantive rules of federal admiralty law apply regardless of whether the plaintiff invokes admiralty jurisdiction. 14A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3671 (1998); *East River*, 476 U.S. at 864 ("With admiralty jurisdiction comes the application of substantive admiralty law"); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245 (1942) (in maritime tort action brought in state court, "[t]he source of the governing law applied is in the national, not the

[6] A respondent may rely on any ground supported by the record when seeking affirmance. The maritime law question addressed by the court below was a necessary predicate and subsidiary element of its decision, and is equally important to this Court's decision. It is intimately connected with the preemption issue and rests on identical statutory provisions. See *LeBron* v. *NRPC*, 513 U.S. 374, 378-382 (1995); *Caterpillar* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996); *Kolstad* v. *ADA*, 527 U.S. 526, 540-541 (1999); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Arkansas Elec. Coop.* v. *Arkansas Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983) ("Commerce Clause" issue fairly subsumes "pre-emption" issue); Opp.11-12, 18, 23; pp. 29-36, *infra*.

state, government"); *Texas Indus.* v. *Radcliff Materials*, 451 U.S. 630, 641 (1981) (in "admiralty cases * * * our federal system does not permit the controversy to be resolved under state law"). Any "attempted changes by the States in the substantive admiralty law" are unlawful. *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001); accord *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994).

Petitioner argues (at 19-20) that the fact that "federal courts possess admiralty jurisdiction" over "maritime torts involving recreational boats" does not "strip the States of their interest in ensuring that the victims of maritime torts be compensated for their injuries." But the only case he cites for that proposition, *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 216 n.14 (1996), dealt only with *damages*, not *liability*. This Court has repeatedly "recognized that vindication of maritime policies demand[s] uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." *Id.* at 210. On remand in *Yamaha*, the Third Circuit concluded that "federal maritime standards" must govern liability. 216 F.3d 338, 351 (2000). See *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970). Thus, neither *Yamaha* nor any other decision of this Court allows petitioner to evade federal maritime principles. See *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986) (requiring federal uniformity in maritime case notwithstanding general savings clause).

C. Where Congress Has Empowered An Expert Agency To Prescribe Uniform Standards For Equipment Design, It Would Be Inappropriate To Permit Juries To Create Inconsistent Duties.

It is black letter law that courts and juries applying common law must act within limits established by legislatures. This principle fully applies to maritime common law. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the

field." *American Dredging Co.*, 510 U.S. at 455. Because Congress has enacted a law directing the Coast Guard to set uniform design standards for recreational boats, courts and juries may not set their own standards under the common law.

Milwaukee v. *Illinois*, 451 U.S. 304 (1981), confirms this conclusion. There the Court held that federal environmental legislation displaced federal common law interstate nuisance claims based on pollutant discharges. Noting that Congress had charged a federal agency with supervising such problems, the Court explained that "federal common law applies until the field has been made the subject of comprehensive legislation or authorized administrative standards." *Id.* at 314; see *id.* at 320 ("Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme"). Because the statute at issue established a "comprehensive regulatory program supervised by an expert administrative agency" trained to address difficult "technical problems," the Court refused to apply "vague and indeterminate nuisance concepts and maxims of equity jurisprudence" that were bound to be "sporadic" and "ad hoc." *Id.* at 317, 325. Where the issue is the scope of federal common law in the face of congressional action, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317. "Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with common sense and the public weal' when Congress has addressed the problem." *Id.* at 315, 317.

Displacement of federal common law by federal statutory law thus differs from preemption of state law. *First*, because federalism concerns are absent, there is *never* any presumption against displacement. Indeed, in light of separation-of-powers presumptions in favor of legislative over judicial policymaking,

the presumption runs the other way. *Milwaukee*, 451 U.S. at 316-317. *Second*, in the case of statutory displacement, there is no requirement of express statement (as in express preemption) or clear conflict (as in implied preemption). Rather, "the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.* at 315 n.8. Nothing more is needed. See *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) (damages for "loss of society" under general maritime law were displaced when Congress enacted the Death on the High Seas Act, which addressed the question of damages without providing for such recoveries); *Dooley* v. *Korean Air Lines Co.*, 524 U.S. 116 (1998) (refusing to recognize maritime survival actions where Congress did not authorize such actions in Death on High Seas Act); *East River*, 476 U.S. at 864 ("*Absent a relevant statute*, the general maritime law, as developed by the judiciary, applies") (emphasis added).

The BSA plainly represents "a single comprehensive Act dealing with the subject of safety for boats" (S. Rep. at 6) that displaces propeller guard claims asserted under federal common law. Congress assigned the task of establishing uniform design standards to the Coast Guard. Pursuant to the Act, the NBSAC, a statutorily created body (46 U.S.C. § 13110), recommended against a propeller guard requirement after 18 months of study, explaining that such a requirement would impair public safety, degrade fuel economy, and confront manufacturers with insurmountable feasibility problems. The Coast Guard in turn refused to mandate propeller guards, pointing to problems of economy and feasibility and explaining that "available accident data" do "not support such a requirement." Pp. 8-13, *supra*. As the Solicitor General states, "the agency has made a considered decision to forgo *federal* regulation" of propeller guards. U.S. Br. 18. That decision is controlling, as there can be only *one* federal rule on propeller guards.

It would be inconsistent with the design of the BSA to allow jury decisions under generalized maritime criteria applied in fifty States to second-guess or even supplement the Coast Guard's decision on the same subject. Congress delegated standard-setting authority to a single expert agency, and expressly forbade states to make or enforce any standard not "identical" to the federal standard. 46 U.S.C. § 4306. Congress determined that this approach would best achieve the goal of uniformity of regulation in this field.

The policy of uniformity lies at the heart of both the BSA and federal admiralty law. Admiralty law does not recognize any claim that "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law." *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917); see *Foremost*, 457 U.S. at 674-675 (federal interest in governing maritime commerce "can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct"); *id.* at 677; *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574-575 (1874) (in "all cases of admiralty and maritime jurisdiction," it is "unquestionable" that "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country"); *Moragne*, 398 U.S. at 401.

Allowing juries to set their own standards would frustrate this goal of uniformity. If an Illinois jury mandated installation of propeller guards, manufacturers would be forced by threat of actual and punitive damages to install them, exposing boaters to the very dangers identified in the NBSAC's report—dangers the Coast Guard has never denied in its subsequent review of propeller guards or in its brief in this Court. In subsequent cases, persons injured by propeller guards—because of their enlargement of the underwater profile of the drive system, interference with safe steering, or capacity to entangle and mutilate limbs—could bring suit in other jurisdictions asserting that installation of such guards was unreasonably dangerous,

citing the NBSAC's report as conclusive evidence. Inconsistent decisions in such cases would be driven by the facts of particular accidents and understandable human sympathy, but without the industry-wide experience developed through the NBSAC's 18-month investigation. Given Congress's preference for uniform design standards, that result should not be countenanced under federal maritime law. *United States* v. *NASD, Inc.*, 422 U.S. 694, 734-735 (1975) (federal common law should be construed to avoid "duplicative and inconsistent standards" or "conflicting judgments that might be voiced by courts"). If controversial devices such as propeller guards are to be mandated, this should be done on a uniform basis by the expert agency charged with protection of the general public.

Courts applying federal common law defer to administrative schemes because "a federal official with an overview of all possible ramifications of a particular requirement" is in "the best position to balance all the competing interests." *Locke*, 529 U.S. at 110. When it comes to "far-reaching" "policy questions" that require weighing a broad "range of factors * * * beyond the record of a single lawsuit," expert agencies applying statutory criteria are better suited than common law courts to gather evidence and take into account multiple competing interests. *Texas Indus.*, 451 U.S. at 646-647. Agencies possess "power far exceeding and different from the conventional judicial modes for adjusting conflicting claims" and are able to "control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142-143 (1940).

"It was precisely to take advantage of the expertise and flexibility available in the administrative process" that Congress "opted for a system of administrative rather than statutory standards." S. Rep. at 17. If courts applying general maritime law could require propeller guards, that would usurp the quasi-

legislative role that Congress has assigned to the Coast Guard. See H.R. Rep. at 2 ("It is time that recreational boats be built in accordance with standards prescribed by one Federal agency"); *supra* pp. 1-3.[7]

D. Propeller Guard Claims Are Not Cognizable Under The Majority Common-Law Rule, Which Federal Maritime Law Generally Follows.

The decision below thus must be affirmed on the ground that common law standards for boat design have been displaced by an Act that vests standard-setting authority in an expert agency, which has made a considered decision not to require propeller guards. Even if federal maritime law had *not* been displaced by the BSA, however, the decision below would still be correct, because federal maritime law itself would not countenance any suit premised on a common law duty to install propeller guards.

Federal maritime law generally serves the goal of uniformity by incorporating common law rules adopted in a majority of the States. *E.g.*, *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573, 587-588 (1974). Courts in maritime products liability actions, for example, have looked to RESTATEMENT (SECOND) OF TORTS § 402A. *E.g.*, *East River*, 476 U.S. at 864-865. But in adopting substantive rules of conduct, this Court has taken a cautious approach, declining to impose novel duties or untested theories

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[7] See James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1576 (1973) ("the legislative and administrative processes are institutionally suited" to "establishment of specific product design standards"); Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1219 (1996) ("agencies are generally well-equipped to make objective decisions about risk management and other product safety issues" because "agency personnel are likely to be familiar with the technical aspects of the products they regulate," "the procedures by which product safety standards are formulated provide the agency with opinions and information from a wide variety of sources," and "agencies can take a diversity of interests into account").

of liability. In *East River*, for instance, the Court recognized that strict products liability fit comfortably within admiralty law because it was "long a part of the common law of torts" and had been "overwhelmingly" adopted by the federal courts of appeals. *Id.* at 865. But it went on to reject the novel theory that liability may result from a product "injuring itself" that a majority of States had not accepted. *Id.* at 871.

Similarly, in *Miles* v. *Apex*, 498 U.S. 19 (1990), a wrongful death case brought under maritime law, this Court refused to recognize a new cause of action for loss of society and future earnings. While acknowledging "strong policy arguments for allowing such recovery," the Court explained that "[m]aritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Id.* at 35-36. The Court "will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id.* at 36.

The Illinois courts that heard this case were correct to adopt a similarly circumspect approach to petitioner's propeller guard claim, which has been rejected on the merits by virtually every court to consider it. *E.g.*, *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990); *Fitzpatrick* v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993); *Pree* v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993); *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991); see also n.9, *infra*. *Cf. Seymour* v. *Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995) (remanding for proceedings under changed state precedent but expressing no opinion on merits of propeller guard claim). No court in *any* jurisdiction has adopted a mandatory propeller guard standard.

This makes perfect sense in light of the NBSAC's exhaustive study concluding that propeller guards are unhelpful, infeasible, and downright dangerous. Leading authorities recognize that compliance with regulatory requirements is typically enough to show compliance with any applicable common law duty. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 233 (5th ed. 1984) ("Where there is a normal situation, clearly identical with that contemplated by the statute or regulation, and no special circumstances or danger are involved, it may be found, and can be ruled as a matter of law, that the actor has done his full duty by complying with the statute, and nothing more is required"). That rule is particularly relevant here, given manufacturers' conscious and universal decision not to install dangerous propeller guard devices and the Coast Guard's continuous monitoring of the propeller guard issue. *E.g.*, *Jackson* v. *OMI Corp.*, 245 F.3d 525, 528 (5th Cir. 2001) (rejecting design defect claim in view of Coast Guard standard and general industry custom).[8]

It would be especially anomalous to allow a jury to contradict the majority view on propeller guards. Such a ruling—which would have the character of a general legislative standard and would not pertain to unique local conditions—could effectively force manufacturers to install such devices. Given the realities of mass production and the mobility of boats across state borders (as the facts here illustrate), such a requirement could quickly visit detrimental consequences on residents of other States. And because the BSA preempts state legislatures from prohibiting propeller guards, they would be helpless to protect their citizens against such consequences. See U.S. Br. at 11-12

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[8] It is also settled that a claim of this sort need not go to the jury but may be disposed of by motion. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. *f* (1998) ("The necessity of proving a reasonable alternative design as a predicate for establishing design defect" is "addressed initially to the courts"). See also Ill. S. Ct. Br. for Mercury Marine at 59-72 (collecting authorities).

(the Act "categorically precludes" States from prescribing any "statute or regulation"). This perverse result goes "well beyond the limits of Congress' ordered system" (*Miles*, 498 U.S. at 36) under the BSA. See *East River*, 476 U.S. at 870-876 (exercising "traditional discretion," Court orders dismissal of tort claims and declines to recognize new "duty" under maritime law that would lead to "increased cost to the public," expose manufacturers to "vast sums" in damages, and lead to inconsistent legal obligations); *Jensen*, 244 U.S. at 217 (refusing to recognize duty "[w]here the subject is national in its character, and admits and requires uniformity of regulation affecting alike all the States * * * Congress can alone act upon it and provide the needed regulations"). For all these reasons, the Illinois Supreme Court's decision in this case should be affirmed under federal maritime law.

II. PETITIONER'S CLAIM IS ALSO PREEMPTED BY THE BOAT SAFETY ACT.

Preemption occurs in three principal ways. First, Congress may expressly preempt state law. *English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990). Second, Congress may override state law by indicating an intent to occupy the field. *Id.* at 79. Third, state law may "conflict" with federal law, either by making it impossible "to comply with both state and federal requirements" (*ibid.*), or by creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

The "categories of preemption," however, are not "rigidly distinct"; nor is the analysis mechanical. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000). Rather, "'the purpose of Congress is the ultimate touchstone.'" *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). Preemption is a matter of statutory interpretation that turns on the language, structure, and purposes of the enactment. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). Further, the presence of a "unique federal concern changes what would

otherwise be a conflict that cannot produce pre-emption into one that can." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988).

Like the court below, all nine federal courts to consider the issue have concluded that propeller guard claims are preempted on one or more preemption grounds.[9] The text, structure, purpose, and history of the BSA *all* demonstrate that this formidable body of precedent is correct.

A. The Express Terms Of The Boat Safety Act Manifest Congress's Intent To Preempt Common Law Design Requirements.

1. The express preemption clause bars petitioner's claim.

The BSA's preemption clause provides in pertinent part:

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions within the State) that is not identical to a regulation prescribed under section 4302 of this title.

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[9] *Lady* v. *Neal Glaser Marine*, 228 F.3d 598 (5th Cir. 2000); *Lewis* v. *Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), cert. dismissed, 523 U.S. 1113 (1998); *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss* v. *OMC*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *OMC*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *OMC*, No. J90-0011(L) (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); accord *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992).

46 U.S.C. § 4306. The text of § 4306 is sweeping: no State may establish or enforce any law requiring an item of boat equipment that is not "identical" to an extant Coast Guard regulation. The sole exception is for state regulation of "uniquely hazardous" local conditions, and even then the Coast Guard retains a veto. The Act's plain language demonstrates that petitioner's claim is preempted: he seeks to "establish" and "enforce" a rule of state law requiring propeller guards on a "recreational vessel," and that rule is "not identical to" any Coast Guard regulation.

Section 4306 is far broader than the law at issue in *Geier*, which preempted state law only when "a Federal motor vehicle safety standard * * * *is in effect*." 529 U.S. at 867 (emphasis added). Under the Motor Vehicle Safety Act ("MVSA"), States were free to impose safety standards if no federal standard was in effect. Under the BSA, by contrast, the *absence* of a federal standard is preemptive: States may not establish or enforce any standards that are not identical to federal standards. As the Solicitor General acknowledges (at 11-12), "unless and until the agency has promulgated a safety standard dealing with a particular matter," the Act "categorically precludes the States from adopting such a requirement by statute or regulation."

Thus, when the Solicitor General (at 19, 22-26) relies on *Geier* in contending that the Coast Guard's decision not to require propeller guards cannot have preemptive effect because that decision was not embodied in a "formal safety standard" (accord Pet. Br. 36-37), he overlooks the crucial difference between the statutory preemption clauses: preemption under the MVSA is triggered only by promulgation of a federal "safety standard," but preemption under the BSA extends to federal absence, as well as presence, of regulation. Obviously, that cannot require formal agency action.

In an attempt to minimize the BSA's plain language, petitioner argues that the terms "law," "requirement," and "standard" refer only to "prescriptive requirements" and do not include state *common law* requirements, and that the phrase "State or

political subdivision of a State" refers only to legislatures and agencies. Br. 24, 26-28. These arguments are untenable.

First, the notion that the terms "law," "requirement," and "standard" do not include common law duties is foreclosed by precedent. In *Medtronic*, for example, a majority of this Court agreed that the term "requirement" reaches state tort claims. As Justice O'Connor explained, "state common-law damages actions operate to require manufacturers to comply with common-law duties," and thus impose "requirements" within the "ordinary meaning" of that term. 518 U.S. at 510-511 (concurring and dissenting); accord *id.* at 504 (Breyer, J., concurring). Similarly, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), held that one of the statutes at issue there preempted common law duties, although it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" *Id.* at 520-524 (plurality opinion); *id.* at 548-549 (Scalia, J., concurring). It was immaterial that the preemption clause "fail[ed] to include a specific" reference to common-law claims: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.* at 521; see also *id.* at 548-549 (Scalia, J., concurring).

The terms "standard" and "law" likewise embrace common law duties. In *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993), the Court unanimously agreed that "[l]egal duties imposed * * * by the common law fall within the scope of" a clause that preempts "any state 'law, rule, regulation, order, or standard relating to railroad safety.'" See also *Asahi Metal Indus. Co.* v. *Superior Ct.*, 480 U.S. 102, 114-115 (1987) (noting that California products liability law set "safety standards"). And numerous decisions of this Court have held that common law is fairly encompassed within the term "law" or "laws." See *e.g.*, *Cipollone*, 505 U.S. at 522-523; *id.* at 549 (Scalia, J., concurring); *Illinois* v. *Milwaukee*, 406 U.S. 91, 100 (1972) (the

"natural meaning" of "laws," as used in 28 U.S.C. § 1331, includes common law claims); *Norfolk & W.R. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991); *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938).

This substantial body of precedent accords with the common sense proposition that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); *Geier*, 529 U.S. at 882 ("this Court's pre-emption cases ordinarily *assume* compliance with the state law duty in question"). That is why this Court "has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Garmon*, 359 U.S. at 243. Where, as here, Congress expresses a strong intent to fashion uniform federal standards and preempt inconsistent state duties, it is artificial to read terms such as "law," "standard," or "requirement" in a grudging way so as to exclude state common law duties.

Petitioner's argument also ignores the fact that § 4306—in contrast to the statute in *Geier*, 529 U.S. at 869—preempts state *enforcement* of laws, requirements, and standards pertaining to recreational boat design. Enforcement plainly encompasses judicial action, and it is hard to imagine why Congress would bar state courts from enforcing *statutory* but not *common law* standards. "The effects of the state agency regulation and the state tort suit are identical," and it would be "anomalous" to "distinguish between them for pre-emption purposes." *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring). That result would be *especially* anomalous here because—as the government concedes (at 11)—state legislatures cannot overturn any objectionable common law rules. See *infra* p. 41.

Second, petitioner incorrectly asserts (without citation to any authority) that the phrase "State or political subdivision of a

State" does not include state courts. The preemption clause at issue in *Medtronic* barred any "State or political subdivision of a State" from establishing requirements different from those imposed by federal law. 518 U.S. at 481. But that did not deter this Court from finding common law claims to be within the Act's preemptive scope. It is frankly incoherent to argue that the States' judicial systems are not the "State" or one of its "political subdivisions." A jury deciding petitioner's claim could not rule in his favor without finding that Mercury Marine failed to satisfy a legal standard imposed by state law; without such a finding, an award of damages would be lawless. In short, "common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State." *Shelley* v. *Kraemer*, 334 U.S. 1, 17 n.19 (1948).

2. *The legislative history of the BSA confirms that Congress preempted the design standards field.*

The BSA's legislative history emphatically reinforces the plain meaning of § 4306. The House Report explains (at 2, 11) that "[i]t is time that recreational boats be built in accordance with standards prescribed by one Federal agency"—to "pre-emp[t] the field on boating standards or regulations." The Senate Report states that "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." The BSA thus "assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. at 14, 20. The legislative record is replete with similar statements. See *supra* p. 3 & n.1.

Congress also recognized that maritime commerce and boat design have never been subjects of state police power regulation. Rather, the Act implicates Congress's "historic federal maritime jurisdiction," and "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters." S. Rep. at 17, 20. These findings accord with 200 years of this Court's

precedents. See *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1852); accord *Locke*, 529 U.S. at 99 (recognizing "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority").

Thus, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" in the area of "maritime commerce." *Locke*, 529 U.S. at 108. States may "regulate local ports and waters under appropriate circumstances"—where their regulations "do not require adjustment of systemic aspects of the vessel"—but may not interfere "with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce." *Id.* at 108-109, 112. This maritime context fundamentally distinguishes prior cases such as *Geier*.

Petitioner notes that *Locke* involved "foreign affairs" and "international commerce," whereas this case involves a "noncommercial boat." Br. 19-20. But federal authority over maritime commerce is not limited to international matters or commercial boats. *Foremost*, 457 U.S. at 676. Congress invoked "the long history of preemption in maritime safety matters" in passing the BSA. As it recognized, boats are built for interstate markets, and they routinely cross state lines (as here). As the Solicitor General explained (Br. 21) in *Buckman Co.* v. *Plaintiff's Legal Committee*, No. 98-1768, an "'assumption' of non-preemption does not apply 'in an area where there has been a history of significant federal presence,'" and "maritime commerce constitutes such an area."

Petitioner further argues (at 5, 23) that the Coast Guard's authority is "'permissive and not mandatory'" and that the Act establishes only "minimum" standards, facts that he says are "inconsistent with the notion that Congress intended to preempt the entire field." See also U.S. Br. 20-21. These arguments lack merit.

First, it is *Congress's intent* that governs whether the BSA preempts the field. The legislative history reveals both that Congress viewed the BSA as a comprehensive statute that would occupy the field and that it expected the Coast Guard to prescribe all necessary boat design standards.[10] The Coast Guard has done just that, including many fashioned to prevent the type of accident that gave rise to this suit. See *supra* pp. 6-7.

Second, petitioner's argument ignores Congress's intent to establish *uniform* standards. As the Senate Report explains (at 20), Congress allowed the States to "impose requirements * * * which go beyond the federal requirements" only when necessary "to meet uniquely hazardous conditions or circumstances within the State" (§ 4306). Even in that narrow area—which covers only "the carrying or use of marine safety articles"—Congress allowed the Coast Guard to reject state rules, to preserve uniformity in boat design standards.[11]

Third, *Ray* expressly rejected the proposition that Congress's use of "minimum standards" in an Act establishing federal design standards "requires recognition of state authority to impose higher standards than the [Coast Guard] has prescribed." 435 U.S. at 168 n.19. Where "it is sufficiently clear that Congress directed the promulgation of standards on the national level," "minimum standards" (which manufacturers

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[10] See S. Rep. at 17 ("While the language of Section 5 is permissive and not mandatory, the Committee expects that initial standards will be promulgated as soon as practicable"); *ibid.* (Coast Guard standards should cover "a broad variety of features," including "characteristics [of a vessel or related equipment] that reasonably bear on safety" and especially those involving "a serious safety hazard"); *id.* at 6 (the BSA is "a single comprehensive Act dealing with the subject of safety for boats"); H.R. Rep. at 9, 10 (prior law "did not provide a total answer in the field," but the BSA is "a single comprehensive piece of legislation").

[11] See H.R. Rep. at 16 (explaining that, even under this narrow exception, "it is intended that the uniformity of standards expected under this Act shall not be upset by excessive special requirements by individual states").

may exceed) may not be supplemented by state law. *Ibid.* Given the BSA's legislative history and the federal interest in uniformity, *Ray*'s holding (reaffirmed in *Locke*) that Title II of the PWSA preempts the field should govern this case. See *Locke*, 529 U.S. at 110-111. This is a context that "peculiarly * * * calls for uniform law," in which the States may not "supplement" the obligations imposed by federal law. See *Pennsylvania R.R.* v. *Public Serv. Comm'n*, 250 U.S. 566 (1919) (holding that the Safety Appliance Act, which imposes safety design requirements on railroads, preempts the field; states cannot impose additional "guard rail" obligations); *CSX*, 507 U.S. at 673-675 (federal safety program for railroads "preclud[es] additional state regulation"; claim of "negligence" sought to impose "general rule," and did not address "local conditions").

The Solicitor General asserts that the field "of recreational boating safety" is not one "'that Congress intended the Federal Government to occupy exclusively.'" U.S. Br. 14. But the fact that Congress did not preempt the entire field of "recreational boating safety"—which is clear and undisputed, given Congress's stated intention to include the States in law enforcement and education (see S. Rep. at 15)—does not mean that it did not preempt the field of *design standards for recreational boats*. The Solicitor General's argument overlooks the broad language of § 4306, the legislative history stating that Congress preempted the field of design standards, and the maritime context in which Congress has long been the predominant regulator.

3. The Boat Safety Act's savings clause cannot be read to save petitioner's defective design claim.

Petitioner's last response is that the BSA's preemption clause cannot be read to bar his claim because § 4311(g), the Act's savings clause, "expressly *preserves* all common-law claims." Pet. Br. 28. Relying on *Geier*, which he says involves a "nearly identical" savings clause, he argues that Congress drew a line between state common law duties and duties imposed by

prescriptive regulations. *Id.* at 29-30. According to him, the savings clause is "all-inclusive" and provides no "basis for exempting *any* defendant from *any* common-law liability." *Id.* at 29 (emphasis added).

This argument flies in the face of the plain language of the BSA's savings clause. In contrast to the savings clause at issue in *Geier*—which preserved "liability under common law," 15 U.S.C. § 1397—the BSA's savings clause draws no distinction between common law and prescriptive law: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability *at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). By its terms, § 4311(g) applies equally to "State law" and to "common law." It is therefore impossible to read it as "all-inclusive," since that reading would repeal the preemption clause in its entirety. That cannot be correct.[12]

It logically follows that § 4311(g) must be read to save some *subset* of state law and common law—to preserve such law *within a limited domain*. The legislative history confirms this reading. It shows that Congress added the savings clause as a "technical" amendment (see *supra* pp. 5-6), "to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability *which otherwise could pertain*"—*i.e.*, claims "under *the usual tort law* concerning negligence or warranties." S. Hearing at 66 (emphasis added). The Senate Report explains (at 32) that the "purpose of the section is to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards

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[12] Petitioner has conceded (Ill. Br. 12) that "State law" includes "legislative and regulatory standards." Under his reading of § 4311(g), therefore, manufacturers could be held liable under state statutes or regulations imposing design requirements flatly inconsistent with Coast Guard rules. A general savings clause should not be construed to undermine the "established federal-state balance in matters of maritime commerce" and "the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106.

promulgated under the Act will not be a *complete defense* to liability" (emphasis added). Thus, rather than limiting federal preemption of design standards, the savings clause merely bars manufacturers from relying on compliance with federal law as an absolute defense where state law properly plays a role.

Geier recognized that savings clauses that turn on the consequences of "compliance with a federal standard" may "simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law," rather than addressing preemption. 529 U.S. at 869. And here there is a compelling reason to reject a reading of this "technical amendment" that would save every common law claim. Congress saved both "State law" *and* "common law." It did not draw a line between tort suits and prescriptive requirements, and reading the savings clause in an "all-inclusive" way would nullify the preemption clause, a central feature of the BSA. This critical difference between the savings clauses here and in *Geier* confirms that the Court's reconciliation of the preemption and savings clauses there cannot govern this case.[13]

Nothing in the legislative history indicates that Congress preserved design defect claims. As of 1971, when the BSA was enacted, design claims requiring departures from industry practice were far from "usual tort law."[14] And in the very same

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[13] *Geier*, of course, considered issues of highway safety, a traditional subject of state police power. Issues of maritime safety, by contrast, are the province of federal law. See *supra* pp. 17-20.

[14] See Henderson, *supra*, 73 COLUM. L. REV. at 1565 & n.143 (explaining, based on review of "the thousands of products liability decisions reported during the last ten years," that "[i]n the great majority of recent cases, courts have refused to allow juries to pass independent judgment upon the adequacy of defendants' conscious design choices"; the "handful" of exceptions, moreover, "do not reflect a general shift in judicial attitudes towards reviewing conscious design choices so much as they reflect unusual pressures generated by the peculiar facts of these cases"). We are aware of *no* pre-BSA reported decision in which a jury or court sustained a claim

statement in which he indicated that the Coast Guard "would have no objection" to adding a savings clause "to clarify" the Act, Admiral Bender observed that "the Federal Government cannot now preempt the *boating standards* field," allowing "States independently to establish safety standards and equipment requirements so varied as to make it difficult for the manufacturer to comply." He concluded that "*[t]his legislation will correct these problems*." S. Hearing at 50, 66 (emphasis added). Congress cannot have intended to prevent States from regulating boat design under § 4306, while inviting them to do so under § 4311(g).

Read in light of the stated legislative purpose, § 4311(g) preserves several types of tort claims. *First*, as the legislative history indicates, the savings clause does not permit manufacturers to avoid liability for breach of contractual warranties. S. Hearing at 66.[15] *Second*, the savings clause preserves claims against boat owners and operators for negligent operation. Regulation of "safe boat operation and use * * * was felt to be appropriately within the purview of state or local concern." S. Rep. at 20. *Third*, manufacturers may be sued for negligently *manufacturing* or *installing* marine products. For example, a manufacturer could be held liable for selling defective start-in-gear devices that allow motors to start with moving propellers. See 33 C.F.R. § 183.710; *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. App. 1988) (the BSA does not preempt claims based on a defectively manufactured throttle).

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remotely similar to the propeller guard claim in this case. See *Tallentire*, 477 U.S. at 230 (general savings clause was not intended to preserve "largely nonexistent" state law claims).

[15] It is revealing that the statement in favor of a savings clause quoted by petitioner (at 31) refers to "consumers' private remedies." S. Hearing at 88. That is more likely a reference to warranty actions than to personal injury actions, which often are not brought by "consumers" of the product.

Most common law claims involving marine products fall within these categories. Our reading of § 4311(g) thus assures "that there are some significant number of common-law liability cases to save" (*Geier*, 529 U.S. at 868), while giving meaning to *all* of the Act's terms. Petitioner's reading, by contrast, lacks any support in the Act's legislative history, effectively repeals the preemption provision, and disregards the plain language of the savings clause.

In the hope of persuading this Court that the savings clause here is "almost identical" (Pet. Br. 30) to the savings clause in *Geier*, petitioner treats § 4311(g) as if it applied only to "common law" and did not contain the words "or under State law." Only in a single footnote do petitioner and the Solicitor General even mention the "under State law" language of § 4311(g), which so evidently distinguishes this case from *Geier*. In one offhand sentence, they dismiss the reference to "State law" as "merely indicat[ing] that some forms of damages liability in some states are imposed via statute rather than common law." See Pet. Br. 30 n.11; U.S. Br. 13 n.2. Both cite *Cipollone*, 505 U.S. at 518, as their sole authority for this reading.

This reading of § 4311(g) has no support in the text, which encompasses all forms of "State law," not just laws pertaining to "damages liability." Nor does the reading derive any support from the legislative history, which speaks of saving remedies for breach of warranty, of the "usual tort law of negligence," and of protection for "consumers"—while declaring that the BSA preempts the field of "boating standards" applicable to "manufacturers." Nor does *Cipollone* support petitioner's position. The Acts at issue there did not contain any savings clauses. The Court merely noted that the phrase "State statutory law" in 15 U.S.C. § 4406(c) would ordinarily encompass "damages" statutes. 505 U.S. at 518. The question here is whether a savings clause may be read to save *only* "damages"

statutes where it saves "State law" without qualification. *Cipollone* is irrelevant to that issue.[16]

Finally, petitioner's and the Solicitor General's reading of the BSA would lead to absurd results that Congress could not have intended. Under § 4306, the States may not enact *any* standards relating to propeller guards. As the Solicitor General explains (at 11, 15), "unless and until the agency has promulgated a safety standard dealing with a particular matter," state safety standards are "categorically preempted." Thus, if an Illinois jury required propeller guards, Illinois legislators would be powerless to implement another view of state safety policy by enacting statutes rejecting that result for future cases.[17]

This would be highly disruptive of the States' law-making power. Lay juries would have more power than elected officials to make state law. Perhaps Congress could enact such a scheme if it wanted to, but there is no reason to presume that it did. The BSA expresses a statutory preference for expert and uniform judgment in the promulgation of design standards. Every standard must be "reasonable" and justified by a cost-benefit analysis. See *supra* p. 2. Congress opted for this approach "precisely to take advantage of the expertise and flexibility available in the administrative process." S. Rep. at 17. It is hard to believe that it wished to give juries in the fifty States *absolute power*—unhindered by the usual checks and balances of state government—to impose their own design standards.

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[16] Under petitioner's reading of § 4311(g), moreover, the States would be free to pass a statute mandating propeller guards that is enforceable through actual and punitive damages. That reading hardly reconciles the savings clause and the preemption provision.

[17] This was not true under the statute in *Geier*, which permitted individual States to enact divergent design standards unless a federal standard was "in effect." 529 U.S. at 867. Thus, if a jury imposed a duty that a state legislature disapproved, the legislature could set its own standard for future cases.

B. Petitioner's Claim Would Frustrate The Purposes Of The Boat Safety Act.

Whether or not the BSA preempts *all* design defect claims, petitioner's claim conflicts with the Act and stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This form of conflict preemption is unaffected by a general savings clause. *Geier*, 529 U.S. at 869-872. In enacting the BSA, Congress intended to replace a patchwork of state regulation with a single uniform, feasible, economic set of safety rules established by an expert agency and imposed on a prospective basis. Petitioner's attempt to impose a propeller guard requirement through tort litigation would frustrate each of those purposes.[18]

1. Petitioner's claim conflicts with the core objectives of the Act.

a. The BSA's Goal of Uniformity. The BSA seeks to protect those who mass-produce boats or motors from having to satisfy varying (and potentially conflicting) state design standards that interfere with interstate mobility. Congress's commitment to uniform design standards is reflected in its limitation of state involvement to requirements addressing "uniquely hazardous" local conditions (§ 4306). The legislative history is replete with evidence of "the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20; see *supra* p. 3 & n.1. As the court below observed: "[u]niformity is particularly important where * * * the federal statute relates to a product that is inherently mobile." Pet. App. 7.

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[18] Petitioner incorrectly asserts (Br. 35) that *Geier* held that, where a savings clause exists, "any finding of preemption is 'disfavored.'" The Court there expressly rejected this "special burden" theory. See 529 U.S. at 872-874. Petitioner quotes from a section of the opinion setting forth an argument that the Court proceeded to disapprove. Accord *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001).

To allow individual state court juries to impose damages, including punitive damages, against manufacturers for failure to install propeller guards would clearly frustrate Congress's intention to achieve uniformity in this field. *Boyle*, 487 U.S. at 508 ("where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules"). If an Illinois jury required propeller guards, respondent would have two options: build all motors with guards, or build motors for Illinois with guards and motors for other States without them. If respondent built one set of motors, Illinois would effectively be imposing a controversial design upon the entire nation. See *Locke*, 529 U.S. at 112 (States may regulate "local peculiarities," but may not regulate "outside the jurisdiction" or "require adjustment of systemic aspects of the vessel"); *BMW, Inc.* v. *Gore*, 517 U.S. 559, 571 (1996) ("one State's power to impose burdens on the interstate market for [boats]" is "constrained by the need to respect the interests of other States"). If it built two sets of motors, that would frustrate Congress's objective of "assur[ing] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. at 20.

Worse, while petitioner's Illinois jury might impose damages on respondent for not installing propeller guards, a jury in another state (or county) might impose damages if it installed them. *Elliott*, 903 F.2d at 1509 (reversing a verdict requiring propeller guards and stating that "the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate"). And given the frequency with which boats cross state borders (as here), manufacturers could not limit their exposure to liability even if they limited sales of certain motors to certain States. Nor could state legislatures solve the problem, as they are expressly preempted from establishing any standards not identical to federal standards.

Petitioner's claim should not be permitted to frustrate the BSA's policy of protecting interstate commerce. *Bibb* v. *Navajo*

Freight Lines, 359 U.S. 520 (1959) (invalidating state requirement for contoured mudflaps where 45 States allowed straight mudflaps); *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 775 (1945) ("such regulation, if any, must be prescribed by a single body having a nation-wide authority"); *Kassel* v. *Consolidated Freightways*, 450 U.S. 662 (1981). As this Court has explained, it is "incongruous * * * that a Congress seeking uniformity in maritime law would intend to allow widely divergent state [tort] law" to upset it. *Tallentire*, 477 U.S. at 230.

It is no answer to say that this case involves only the imposition of damages, and not the setting of inconsistent standards. Such an argument disregards the regulatory effect of tort law. "[T]his Court's pre-emption cases ordinarily *assume* compliance with the state law duty in question," and "a rule of state tort law imposing [a duty to install equipment] by its terms would * * * require[] manufacturers of all similar [products] to install [such equipment]." *Geier*, 529 U.S. at 881, 882. A verdict holding a manufacturer liable for not installing a propeller guard would obligate the manufacturer to retrofit *all similar motors* within the State; its effect would not be limited to "a *particular* boat engine." Pet. Br. 40. Thus, Congress's interest in uniformity is directly implicated by inconsistent tort judgments.

b. The RSA's Requirement of Administrative Review under Statutory Criteria. Allowing petitioner's claim to proceed would also contravene Congress's intent that design standards be imposed only after deliberation by expert administrators applying detailed statutory criteria. See *supra* p. 2. The Coast Guard must consult with the NBSAC—whose 21 members include state regulators—in deciding whether to regulate. *Ibid.* Congress directed that the agency balance competing interests, conduct a cost-benefit analysis of every proposed rule, consider "technical feasibility," and require compliance only when "economically and physically reasonable in relation to the hazard." S. Rep. at 17-18. It also required that rules be "stated, insofar as practicable, in terms of performance." See *supra* p. 1.

"It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards * * * that the Committee opted for a system of administrative rather than statutory standards." S. Rep. at 17. Even state legislatures may not regulate design; the agency's authority is *exclusive*.

Unlike the Coast Guard, juries lack technical expertise in matters of maritime safety and hydrodynamics and focus narrowly on the facts of particular cases. They are not accustomed to taking into account the diverse interests that are affected by quasi-legislative standards. And they are unable to measure performance, to conduct field tests to see whether standards are technically feasible, or to make fully informed decisions about risks. See pp. 24-25 & n.7, *supra*. It is hard to believe that Congress would have given to juries a power over boat design that it was unwilling to entrust to state legislatures or agencies, and petitioner's suggestion (Br. 14) that juries and the Coast Guard should "work together" to design safe boats is difficult to take seriously. See *Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means").

Petitioner says that "holding a manufacturer liable for failing to include a *particular* propeller guard on a *particular* boat engine" would not frustrate the Coast Guard's judgment that no "universally acceptable" propeller guard is feasible. Br. 40. Accord U.S. Br. 27. But this reflects a fundamental misunderstanding of the problem. Outboard motors are not custom-made for particular boats; they are made to fit *any* boat with an appropriate horsepower rating. 33 C.F.R. § 183.53. Any guard must be "hydrodynamically and structurally compatible with the intended propulsion unit" and "the hull on which the motor is used." J.A. 38. There are "thousands of hull designs" and "hundreds of propulsion unit[s]," *ibid.*, and manufacturers have no way to know which of the "vast array" of boats will be paired with their motors. J.A. 83. Thus, the question is not whether a "particular" motor should be fitted with a

"particular" propeller guard, but how a guard could be designed that would be compatible with the full range of boats on which it might be used. As the Coast Guard concluded: no "universally acceptable propeller guard is available or technically feasible," and "retrofitting millions of boats would certainly be a major economic consideration." J.A. 80; see *id.* at 83 (citing the "vast array of boat configurations"). Congress carefully drafted this statute to prevent just such effects.

c. The BSA's Ban on Substantial Alterations of Existing Boats. Finally, Congress determined that safety standards should be established and enforced on a prospective basis. The Coast Guard may "not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence." 46 U.S.C. § 4302(c)(3). "The term 'substantial alteration' * * * encompass[es] economic as well as physical considerations," and "great caution [must] be exercised in applying standards to existing boats because of the great burden this can create on both manufacturers and the boating public." S. Rep. at 18-19.[19]

A common law propeller guard requirement would plainly frustrate the BSA's ban on requiring substantial alterations of existing boats. Such a requirement would work a major re-design of the boat motor's drive system. Moreover, tort law inevitably operates retrospectively, and manufacturers would be pressured by tort judgments to modify millions of outboard motors to avoid open-ended civil liability. To allow such design

[19] Petitioner states that the Coast Guard may not compel substantial alterations of existing boats "*unless* the Coast Guard makes a determination that the regulation is necessary to 'avoid a substantial risk of personal injury to the public, that the [agency] considers appropriate in relation to the degree of hazard that the compliance will correct.'" Pet. Br. 5 (emphasis added); accord U.S. Br. 3. That is not what the Act says. It says the Coast Guard may "not compel substantial alteration" of existing boats, "*but subject to that limitation* may require compliance or performance to avoid a substantial risk of personal injury to the public." 46 U.S.C. § 4302(c)(3) (emphasis added). The legislative history confirms that *all* substantial alterations of existing boats are barred. S. Rep. at 18-19.

defect claims would frustrate Congress's purpose of achieving uniform, feasible, economic, prospective safety standards, on the basis of expert judgment.[20]

2. The Coast Guard's decision not to require propeller guards reinforces a finding of conflict preemption.

Finally, as the court below held (Pet. App. 18-19), a common law damages action for failure to install propeller guards is impliedly preempted by the Coast Guard's decision, after 1[illegible] months of study, not to require propeller guards on recreational planing boats. As in *Geier*, the agency here considered the benefits and risks of a single piece of equipment and made a judgment that the purposes of the BSA would best be served if the item was *not* required. 529 U.S. at 881. In cases involving decisions not to regulate, the operative question is whether the failure of "federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved *pursuant to the policy of the statute*." *Ray*, 435 U.S. at 178 (emphasis added).

In *Ray*, the Court invalidated a Washington law that banned large ships from navigating in Puget Sound, where the Coast Guard had authority to regulate vessel size and traffic under Title I of the PWSA. The Coast Guard had not adopted size limitations, instead opting for a traffic rule that prohibited two large ships from passing through the Sound at the same time. Noting that the legislative history stressed "the importance of uniformity of regulation" and "the careful consideration that the Secretary must give to various factors before exercising his authority"—"including the scope and degree of hazard" and the

[20] A jury could not mandate propeller guards without placing manufacturers in violation of Coast Guard regulations. The Coast Guard requires that all boats equipped with outboard motors be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle setting" at "maximum throttle." 33 C.F.R. § 183.53. The NBSAC found that boats equipped with ring guards could not pass this test. J.A. 31-32.

"economic impact" of regulation—the Court explained that "it was anticipated that there would be a single decisionmaker, rather than a different one in each State." 435 U.S. at 177. Because the Secretary "exercised his authority in accordance with the statutory directives" and considered the "variety of interests which may be affected by [its] exercise," yet acted in a "narrow" manner, the Court held that his "*failure to promulgate a ban*" on large ships "takes on the character of a ruling that no such regulation is appropriate or approved *pursuant to the policy of the statute*." *Id.* at 178 (emphasis added).

So it is here. The BSA reflects a deep concern for "uniformity" and decisionmaking by a single expert regulator. The Coast Guard followed the BSA's requirements to the letter, directed the NBSAC to engage in comprehensive factfinding concerning propeller guards, and invited public participation. See *supra* pp. 7-8. Its decision—which declined to require propeller guards—was based on the criteria for regulation under the Act. Because the Coast Guard "exercised [its] authority in accordance with the statutory directives," its decision "takes on [a preemptive] character." *Ray*, 435 U.S. at 178.

The contrary claims of petitioner and the Solicitor General are mistaken. *First*, they question whether the Coast Guard's decision was rendered with sufficient formality. See Pet. Br. 36; U.S. Br. 22-26. There is no support for such a requirement in this Court's preemption cases. See *Geier*, 529 U.S. at 884-885. This is particularly clear under the BSA, which expressly preempts all state laws and regulations that are not "identical" to existing federal standards. 46 U.S.C. § 4306. The BSA's preemption provision—unlike that in *Geier*—gives preemptive effect to the *absence* of regulation, which obviously need not be embodied in formal rules.

Second, they claim that the Coast Guard's ruling did not adopt the reasoning of the NBSAC and thus should be seen as agnostic on the subject of propeller guards. Pet. Br. 38-40; U.S. Br. 28-29. But this is a highly implausible post hoc reading of the

Coast Guard's ruling. In refusing to require propeller guards, the Coast Guard's ruling closely tracked the NBSAC's findings and followed the statutory criteria concerning safety regulations to the letter. See J.A. 80 ("All of the report's recommendations are accepted" and "will be implemented"). The letter in which that decision was set forth contains not the slightest suggestion that the Coast Guard took a different view of the relative safety hazards and benefits of propeller guards. Indeed, the Coast Guard cited "the many questions about whether a universally acceptable propeller guard is available or technically feasible" and referred to the "accident data" in the NBSAC's report.[21]

This case, however, does not call for an exhaustive "inquiry into the [agency's] purposes" in refusing to mandate propeller guards. See *CSX*, 507 U.S. at 675. The dispositive question is whether the Coast Guard had unresolved policy concerns of its own—based on the criteria for regulating under the Act—which showed that it would be unwise for manufacturers to be

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[21] The "propeller guard accident data" cited by the Coast Guard *themselves* show that propeller guards increase the risk of injury. Roughly 80 percent of propeller accidents occur at "speeds in excess of 10 miles per hour," and "a skull impact at 10 mph or more in the water would be generally fatal"—"[e]ven with an idealized cushioning material, not currently known to exist." J.A. 25, 33-37. The Subcommittee's finding that propeller guards increase the likelihood of collision with the motor—by increasing the size of the drive system and the risk of blunt trauma injury—thus confirms that *any* guard would increase the risk of fatality in a high percentage of accidents.

Similarly, the Subcommittee found that "it is not practical or feasible to mandate guards for specific uses" and that guards only work for boats that operate at "slow speeds." J.A. 36, 38. The Coast Guard agreed that there are many unresolved questions about whether a "universally acceptable propeller guard is available or technically feasible in all modes of boat operation." J.A. 80. The Subcommittee found that "[a]ny guard would have to be both hydrodynamically and structurally compatible" with both the boat and motor on which it is used, that designing a universal guard was infeasible, and that individualized guards involved "prohibitive cost." J.A. 38. The Coast Guard cited the same problem of feasibility, the "vast array of boat configurations," and the large cost of "retrofitting millions of boats." J.A. 80, 83.

required to install them. The BSA is designed not only to facilitate design requirements that foster safety, but also to ensure that those requirements that *are* imposed are not a risky experiment that could jeopardize public safety. That is why the Coast Guard's ruling explained that "[t]he regulatory process is very structured and stringent regarding justification." J.A. 80.

Contrary to the Solicitor General (at 18), we do not suggest that a federal agency's considered decision not to regulate always has preemptive effect. But when the decision is made on the basis of the findings of a statutorily-constituted expert body —which concluded that a proposed safety device is not feasible and may produce more injuries than it would prevent—and when Congress has affirmatively insisted that state law may not be applied until the expert agency is persuaded to impose an on-point federal rule, it is not realistic to read it any other way. The Coast Guard's decision regarding propeller guards plainly has the character of "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray*, 435 U.S. at 178. Accordingly, it has preemptive effect.

* * * * *

In the end, petitioner provides no answer to the dispositive question of congressional intent: why would Congress direct the Coast Guard to craft a program of uniform federal design standards that meet detailed statutory criteria—while precluding state legislatures and agencies from playing any role even in the absence of a federal standard—yet allow state courts and juries to mandate installation of potentially dangerous equipment that the Coast Guard expressly declined to approve? The incoherence of such a scheme is a convincing rebuttal to petitioner's claims.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted.

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